

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-7024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD VOIGHT and
DICK VOIGHT BUICK, INC.

Plaintiffs-Appellants

vs.

GENERAL MOTORS CORPORATION,
MOTOR HOLDING DIVISION,
GENERAL MOTORS CORPORATION;
BUICK MOTOR DIVISION,
GENERAL MOTORS CORPORATION;
GENERAL MOTORS ACCEPTANCE CORPORATION,
ARGONAUT DIVISION, GENERAL MOTORS CORPORATION;
MARINE MIDLAND BANK, EDWARD HIGGINS,
HARRY FORNOROLA, WILLIAM MONRIAN,

DOCKET # 77-7024

Defendants

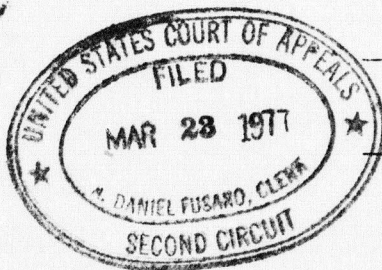
and

MARINE MIDLAND BANK, HARRY FORNOROLA and
WILLIAM MONRIAN

Defendants-Appellees

NATURE OF PROCEEDINGS: APPEAL

COURT BELOW: UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT
PURSUANT TO SECOND
CIRCUIT RULE 28(a)(2)

The Judge who rendered the Decision appealed from by Appellants is the HONORABLE HAROLD P. BURKE, District Court Judge, for the Western District of New York. To Appellants' knowledge, JUDGE BURKE'S Decision is not reported.

STATEMENT OF THE ISSUES PRESENTED
FOR REVIEW PURSUANT TO FEDERAL RULES
OF APPELLATE PROCEDURE, RULE 28(a)(2).

The following issues are presented to this Court for review by Plaintiffs-Appellants:

I. Whether Plaintiffs' Complaint states a claim against the MARINE MIDLAND Defendants for violations of Sections 1 and 2 of the Sherman Antitrust Act. (15 U.S.C. §1, 2)

II. Whether Plaintiffs' Complaint states a claim against the MARINE MIDLAND Defendants for violations of the Federal Securities Laws.

III. Whether Plaintiffs' Complaint states a claim against the MARINE MIDLAND Defendants for violations of Sections 3 and 7 of the Clayton Antitrust Act. (15 U.S.C. §14, 13)

IV. Whether COUNT XI of Plaintiffs' Complaint alleging conspiracy to violate Federal Laws against the MARINE MIDLAND Defendants provides a sufficient basis for this Court to retain jurisdiction over said Defendants.

V. Whether the Court below erred in dismissing Plaintiffs' Complaint with prejudice, thus effectively denying Plaintiffs an opportunity to move for leave to amend their Complaint.

Each of the issues presented for review is discussed by the Plaintiffs-Appellants under the corresponding number in Plaintiffs' Argument, infra.

STATEMENT OF THE CASE PURSUANT TO
FEDERAL RULES OF APPELLATE PROCEDURE
RULE 28(a)(3).

This is a Civil action brought by Plaintiffs-Appellants RICHARD VOIGHT and DICK VOIGHT BUICK, INC. in the United States District Court for the Western District of New York for money damages. There are two (2) groups of Defendants. One group includes GENERAL MOTORS CORPORATION, several of its divisions and EDWARD HIGGINS, one of its employees. This group will hereinafter be referred to as the GENERAL MOTORS Defendants. The GENERAL MOTORS Defendants filed and served an Answer to Plaintiffs' Complaint and the action against the GENERAL MOTORS Defendants is presently pending in the District Court. The other group of Defendants includes MARINE MIDLAND BANK, and two (2) of its employees, WILLIAM MONRIAN and HARRY FORNOROLA. This group will hereinafter be referred to as MARINE MIDLAND Defendants. The MARINE MIDLAND Defendants moved to dismiss Plaintiffs' Complaint and did not serve an Answer. The motion (Appendix, pp.76-82) was returnable before the HONORABLE HAROLD P. BURKE, District Court Judge and Briefs were submitted to him by Counsel for Plaintiffs and the MARINE MIDLAND Defendants. JUDGE BURKE issued a written Decision on December 14, 1976, dismissing the Complaint in its entirety with prejudice against the MARINE MIDLAND Defendants and EDWARD HIGGINS, a GENERAL MOTORS employee (Appendix, pp. 93-96).

The Court subsequently corrected this inadvertent error and made its Order of Dismissal with prejudice applicable to the MARINE MIDLAND Defendants only (Appendix, pp. 100, 101). The Court also determined pursuant to Rule 54 of the Federal Rules of Civil Procedure that there was no reason for delay of Appeal and directed entry of Judgment dismissing the Complaint in its entirety against the MARINE MIDLAND Defendants (Appendix, pp. 98-99).

STATEMENT OF FACTS

From 1967 to 1975, Plaintiff RICHARD VOIGHT was a BUICK Dealer in Rochester, New York. (Complaint ¶3; Appendix, p. 2) Plaintiff, DICK VOIGHT BUICK, INC., was the dealership corporation formed at the time Plaintiff RICHARD VOIGHT became a dealer (Complaint ¶2; Appendix, p. 2). Stock in the dealership corporation was partly owned by Plaintiff RICHARD VOIGHT; the remainder was owned by MOTORS HOLDING DIVISION, a subdivision of GENERAL MOTORS CORPORATION (Complaint ¶14; Appendix, p. 6). During the period that the dealership was in operation, MARINE MIDLAND BANK provided the wholesale and retail financing for Plaintiff's dealership and was the primary financial institution with which Plaintiffs did business (Complaint ¶37, 24, 39; Appendix, pp. 16, 13-14, 19-20).

Plaintiffs allege that the GENERAL MOTORS and MARINE MIDLAND Defendants engaged in a combination and conspiracy with the following objectives:

1. To use Plaintiffs as a market stimulator in the Rochester Metropolitan area to promote the sale of BUICK automobiles; and
2. To drive Plaintiffs out of business once they had served this purpose.

These objectives were attained. Plaintiffs ran a successful BUICK dealership for several years. When Plaintiffs had fulfilled the objectives desired by Defendants, the Defendants then combined to force Plaintiffs out of business.

Plaintiffs contend that the conduct of the Defendants was unlawful and that Plaintiffs are entitled to recover money damages from Defendants for this unlawful conduct. The GENERAL MOTORS Defendants have answered the Plaintiffs' Complaint and the matter is presently pending in the District Court as to these parties. The MARINE MIDLAND Defendants moved to dismiss Plaintiffs' Complaint for failure to state a claim and the District Court dismissed the Complaint as to the MARINE MIDLAND Defendants with prejudice (Appendix, pp. 101).

The Federal claims asserted against the MARINE MIDLAND Defendants are violations of Sections 1 and 2 of the Sherman Antitrust Act, Sections 3 and 7 of the Clayton Antitrust Act, violations of the Federal Securities Laws, and conspiracy to violate Federal laws. These claims are set forth in Plaintiffs' Complaint at COUNTS X, XI and XII (Sherman and Clayton violations), COUNT XVI (Securities violations) and COUNT XV (conspiracy to violate Federal Laws) (Appendix, pp. 34-36, 40-44, 39-40). The facts supporting Plaintiffs' claims under each of these Counts are set forth in detail in Plaintiffs' Argument on each specific point. In addition to these claims, Plaintiffs have asserted

several non-Federal claims against both sets of Defendants.

Plaintiffs' claims are based on the following facts: The MARINE MIDLAND Defendants were involved in fraudulent dealings with Plaintiffs, manipulated Plaintiffs' financial position, breached contracts with Plaintiff, exerted great control over Plaintiffs, and played a key role in the destruction of Plaintiffs' business. These activities were carried out with the knowledge and approval of the GENERAL MOTORS Defendants and in many instances, were carried out as a result of a combination and conspiracy between the MARINE MIDLAND Defendants and the GENERAL MOTORS Defendants. The ultimate result was that Plaintiffs' dealership was forced out of business in 1975, as a result of the unlawful conduct of all Defendants.

More specific examples of the illegal conduct of the MARINE MIDLAND Defendants are set forth in Plaintiffs' Argument.

ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT STATES A CLAIM
AGAINST THE MARINE MIDLAND DEFENDANTS
FOR VIOLATIONS OF SECTIONS 1 and 2
OF THE SHERMAN ANTITRUST ACT.

The District Court dismissed Plaintiffs' claims against the MARINE MIDLAND Defendants under Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §1, §2) with prejudice (Appendix, p. 95). COUNTS X, XI and XII of Plaintiffs' Complaint allege that all Defendants, including the MARINE MIDLAND Defendants violated these Statutes (Appendix, pp. 34-36).

Section 1 of the Sherman Act provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal".

Plaintiffs have alleged that the MARINE MIDLAND Defendants combined and conspired with the GENERAL MOTORS Defendants to restrain trade and commerce.

The facts supporting these claims are that the GENERAL MOTORS Defendants, as part of a nationwide pattern of conduct, induced Plaintiff, RICHARD VOIGHT, to become a BUICK dealer in Rochester, New York (Complaint ¶13; Appendix, pp. 13-14). The GENERAL MOTORS Defendants used Plaintiffs as a market primer to increase retail sales of BUICK automobiles in the Rochester,

New York area. After Plaintiffs had served their purpose as a market primer for several years, the GENERAL MOTORS Defendants forced Plaintiffs out of business and reacquired the assets of Plaintiffs for their own use.

The MARINE MIDLAND Defendants acted in concert and combination with the GENERAL MOTORS Defendants to accomplish the unlawful goals set by the GENERAL MOTORS Defendants. MARINE MIDLAND BANK was the financing institution which dealt with Plaintiffs' dealership (Complaint ¶37, 24, 39; Appendix, pp. 16, 13-14, 19-20). Facts alleged by the Plaintiffs in their Complaint which support the allegations of unlawful conduct by the MARINE MIDLAND Defendants, include the following: that the MARINE MIDLAND Defendants recommended an inadequate original capitalization for Plaintiffs' dealership (Complaint, ¶40A; Appendix, pp. 20-21), that the MARINE MIDLAND Defendants did not provide proper banking advice to Plaintiffs regarding financial matters (Complaint, ¶40B; Appendix, p. 21), that the MARINE MIDLAND Defendants manipulated Plaintiffs' floor plan at the behest of the GENERAL MOTORS Defendants, and did increase Plaintiffs' floor plan ceiling so that GENERAL MOTORS could force unwanted vehicles upon Plaintiffs, and that all of these acts by the MARINE MIDLAND Defendants were performed with the complete approval of the GENERAL MOTORS Defendants and in combination and concert with said GENERAL MOTORS Defendants (Complaint ¶40; Appendix, p. 20). Partly because of

the financial control which the MARINE MIDLAND Defendants exerted over Plaintiffs, Plaintiffs were at the mercy of the GENERAL MOTORS Defendants during the entire period during which the dealership operated.

Besides this, Plaintiffs have also alleged that there came a time when the GENERAL MOTORS Defendants conspired with the MARINE MIDLAND Defendants to force Plaintiffs out of business and that Plaintiffs were forced out of business by Defendants. Plaintiffs' Complaint alleges the following facts to support this claim against the MARINE MIDLAND Defendants: That the MARINE MIDLAND Defendants agreed to refinance the building, real estate and dealership facilities of Plaintiffs and then revoked a written commitment to do so (Complaint, ¶40F; Appendix, p. 21), that the MARINE MIDLAND Defendants interfered with Plaintiffs' attempts to sell their business to various prospective purchasers (Complaint, ¶40H; Appendix, p. 22), and that the MARINE MIDLAND Defendants unilaterally cancelled Plaintiffs' wholesale floor plan and thus made it impossible for Plaintiffs to remain in business (Complaint, ¶40G; Appendix, pp. 21-22). This conduct of the MARINE MIDLAND Defendants forced Plaintiffs out of business. Plaintiffs contend that these and other actions were taken by the MARINE MIDLAND Defendants at the request of and with the approval of the GENERAL MOTORS Defendants (Complaint ¶40; Appendix, p. 20). The end sought to be achieved by such activity was the destruction

of Plaintiffs' business and this goal was realized.

These allegations give the MARINE MIDLAND Defendants notice of the nucleus of operative facts upon which Plaintiffs' claims against said Defendants pursuant to Section 1 of the Sherman Antitrust Act are based. Because of this, the MARINE MIDLAND Defendants' motion to dismiss Plaintiffs' claims under Section 1 of the Sherman Act should have been denied by the District Court.

The leading case regarding dismissal for failure to state a claim is Conley v. Gibson, 355 U.S. 41 (1957), in which the United States Supreme Court stated:

"In appraising the sufficiency of the complaint...the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, supra., at 45.

Furthermore, the United States Supreme Court has held that summary procedures are particularly inappropriate in Antitrust litigation. In Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1968), the Court stated:

"...summary procedures should be used sparingly in complex antitrust litigation for motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot". Poller v. Columbia Broadcasting Systems, Inc., supra., at 473.

The leading Second Circuit case on the issue of failure to state a claim in a private Antitrust action is Nagler v. Admiral Corporation, 248 F.2d 319 (2nd Cir. 1957). There the Appellate Court reversed the lower court's dismissal of a complaint in a private Antitrust action and remanded the case to the District Court, permitting Plaintiffs leave to amend. The Court stated:

"The drastic remedy here granted for pleading errors is unusual, since outright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts...

It is true that antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse, prolonged, and costly. So many defense lawyers have strongly advocated more particularized pleading in this area of litigation; and recently the judges in the court below have treated it as accepted law that some special pleading--the extent is left unclear--is required in antitrust cases. But it is quite clear that the federal rules contain no special exceptions for antitrust cases." Nagler v. Admiral Corporation, supra., at 322, 323.

Plaintiffs' Complaint passes the tests set forth in these cases. It alleges that all Defendants acted in concert and conspired with each other. (See e.g., Complaint, ¶80; Appendix, p. 34). The basis of Plaintiffs' claims under Section 1 of the Sherman Act is that the MARINE MIDLAND Defendants combined and conspired with the GENERAL MOTORS Defendants to control

Plaintiffs' business for several years and subsequently, to drive Plaintiffs out of business when they had served their purpose. Plaintiffs' Complaint puts the MARINE MIDLAND Defendants on notice of the conduct which Plaintiffs claim restrained trade and commerce in violation of Section 1 of the Sherman Antitrust Act.

Defendants contended below that the facts alleged by Plaintiffs were insufficient as a matter of law to state a claim against the MARINE MIDLAND Defendants, pursuant to Section 1 of the Sherman Act. MARINE MIDLAND BANK was Plaintiffs' financing institution and as such could, as a matter of law, have conspired and combined with an automobile manufacturer to violate the Sherman Antitrust Act. In United States v. General Motors, et al., 121 F.2d 376 (7th Cir., 1941), the Court stated at page 402:

"The evidence also disclosed that financing constitutes an essential element in the sale of General Motors cars in interstate commerce, so much so that it is indispensable to the free and easy movement of the cars from the factory to the dealer as well as from the dealer to the retail purchaser. Obviously, any restrictions imposed upon the retail and wholesale financing of cars sold in interstate commerce, which unreasonably impede the free flow of these cars, violate the Sherman Antitrust Act".

In order to establish a violation of Section 1 of the Sherman Act, it is necessary to demonstrate that the contract,

combination or conspiracy is in restraint of interstate or foreign trade or commerce. (15 U.S.C. §1) The thrust of the Act, and the fundamental test in each case is whether the facts, when viewed in the light of reason, evince the existence of a forbidden restraint or an intent to effect a forbidden restraint upon trade. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

At this point, Plaintiffs have alleged the necessary elements of a Sherman §1 violation.

Liability of the MARINE MIDLAND Defendants under the Sherman Act is based upon their status as conspirators with the GENERAL MOTORS Defendants rather than as competitors with Plaintiffs. The GENERAL MOTORS Defendants controlled Plaintiffs with the aid of their co-conspirators, the MARINE MIDLAND Defendants. Because of the conspiracy between the MARINE MIDLAND Defendants and the GENERAL MOTORS Defendants (which originally had as its purpose the use of Plaintiffs as a market primer and subsequently had as its purpose the destruction of Plaintiffs' business) the MARINE MIDLAND Defendants have violated Section 1 of the Sherman Antitrust Act and Plaintiffs have properly stated a claim against the MARINE MIDLAND Defendants for such violation in their Complaint.

COUNT XII of Plaintiffs' Complaint alleges that all Defendants "conspired to engage in unfair competition and to violate the Sherman Antitrust Act, §1 and §2..." (Complaint, ¶89; Appendix, p. 36) GENERAL MOTORS operates wholly factory-owned

outlets for the retail sale of BUICK automobiles and as such, was a competitor of Plaintiffs. The MARINE MIDLAND Defendants are liable as conspirators. These Defendants were not competitors of Plaintiffs, rather, they were the lending institution involved in various financing arrangements with Plaintiffs, whereby Plaintiffs secured the necessary funds to open and operate the automobile dealership. The conspiracy was to destroy Plaintiffs' business.

It is settled law that a concerted effort to destroy a competitor in interstate commerce using unfair or unlawful means may constitute a violation of Section 1 of the Sherman Act. Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F. 2d 96 (1st Cir. 1921), cert. den. 286 U.S. 552, (1932); Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879 (1st Cir. 1960); Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618 (10th Cir. 1965); C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc., 368 F. Supp. 501 (E.D. Pa. 1973); Peerless Dental Supply Co., v. Weber Dental Mfg. Co., 299 F. Supp. 331 (E.D. Pa. 1969).

Furthermore, liability has been imposed upon parties who conspired with a Plaintiff's competitor to destroy his business. Kloss, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). This is the same type of liability sought to be imposed upon the

MARINE MIDLAND Defendants here. There is no requirement that a conspirator must be a competitor of the antitrust Plaintiff to be liable.

The MARINE MIDLAND Defendants' liability under Section 2 of the Sherman Antitrust Act is shown by the same factual allegations which support Plaintiffs' claims under Section 1 of the Sherman Act. The MARINE MIDLAND Defendants are charged with combining and conspiring with the GENERAL MOTORS Defendants in furtherance of the attempts by the GENERAL MOTORS Defendants to monopolize trade and commerce. Plaintiffs claim that the GENERAL MOTORS Defendants attempted to monopolize the retail sale of BUICK automobiles in the Rochester, New York metropolitan area and that the MARINE MIDLAND Defendants conspired with the GENERAL MOTORS Defendants in furtherance of this attempt to monopolize this market.

Plaintiffs have also alleged that the MARINE MIDLAND Defendants threatened to cancel all finance lines of Plaintiffs if Defendant MARINE MIDLAND BANK did not receive all of Plaintiffs' retail paper. (Complaint, ¶84; Appendix, p. 35). This states a claim under Section 2 of the Sherman Act since it shows an attempt to monopolize the entire field of automobile financing on the part of the MARINE MIDLAND Defendants by such coercive tactics.

Two points raised below by Defendants remain for discussion: whether the relevant market and joint action were sufficiently alleged in the Complaint.

Dealing first with the question of the relevant market, Paragraph 22 of Plaintiffs' Complaint states that the geographic market involved was the Rochester Metro Market (Appendix, p. 22). It is obvious from the entire Complaint that the product market involved was the retail sale of BUICK automobiles. Thus, Defendants' contention that the relevant market has not been defined for purposes of Section 2 of the Sherman Act is without merit.

Defendants also attempted to convince the Court below that Plaintiffs did not allege any joint action in the Complaint, and that for this reason, the Complaint did not allege any Sherman Act violations. This position ignored the allegations of Plaintiffs' Complaint that all Defendants "acted in concert and conspired with each other" (Complaint, ¶80; Appendix, p. 34), and that all Defendants "further conspired, to engage in unfair competition and to violate the Sherman Antitrust Act, §1 and §2." (Complaint, ¶89; Appendix, p. 36) Indeed, the main point of Plaintiffs' Antitrust claims against the MARINE MIDLAND Defendants is that said Defendants combined and conspired with the GENERAL MOTORS Defendants and that this conduct was violative of Sections 1 and 2 of the Sherman Act.

Clearly, Plaintiffs are not required to plead every fact supporting their claims in the Complaint. Such pleading is

neither required nor contemplated by the Federal Rules of Civil Procedure. It is sufficient that Defendants be given notice of the basis of Plaintiffs' claim. See Conley v. Gibson, supra; Nagler v. Admiral Corp., supra. Obviously, discovery devices are available to Defendants to inquire as to additional facts supporting Plaintiffs' claims. In all probability, many of these facts will not even be known to Plaintiffs until discovery takes place. The Federal Rules of Civil Procedure do not require Plaintiffs to state all of the facts supporting their claim in the Complaint, but only require that Plaintiffs state a sufficient nucleus of facts to show a colorable claim. Plaintiffs have done so in this action.

To some extent, Plaintiffs have in this Brief set forth facts in addition to those contained in their Complaint in order to support the position that Plaintiffs have proper claims under the Sherman Act. However, the basic transactions complained of are set forth in the Complaint. The Court below had several alternatives when confronted with this motion. It could have denied the motion, required a more definite statement, or at the very least, given Plaintiffs an opportunity to move for leave to serve an Amended Complaint. Instead, the Court dismissed the initial Complaint with prejudice (Appendix, p. 101) and left Plaintiffs no alternative but to appeal. Plaintiffs contend that the District Court's ruling was in error.

ARGUMENT

POINT II

COUNT XVI OF PLAINTIFFS' COMPLAINT STATES
VALID CLAIMS AGAINST THE MARINE MIDLAND
DEFENDANTS FOR VIOLATIONS OF THE SECURITIES
ACT OF 1933 AND THE SECURITIES EXCHANGE
ACT OF 1934.

The MARINE MIDLAND Defendants sought below to have Plaintiffs' claims of violations of the Securities Act of 1933 (15 U.S.C. §77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.), and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5), as alleged in COUNT XVI of Plaintiffs' Complaint (Appendix, p. 40-44) dismissed, arguing that the GENERAL MOTORS franchise agreement and the shares of stock in DICK VOIGHT BUICK, INC. were not securities within the meaning of the 1933 and 1934 Acts (See 15 U.S.C. §77b[1], §78c[10]). However, whether the GENERAL MOTORS franchise agreement and the shares of stock issued thereunder are "securities" requires analysis of the specific facts of this situation in light of the various tests developed by the cases. S.E.C. v. W. J. Howey Co., 328 U.S. 293 (1946); S.E.C. v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973); Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811 (1961). Such a determination involves questions of fact impossible to resolve on a Motion to Dismiss the Complaint. For this reason, the MARINE MIDLAND Defendants' Motion to Dismiss should have been denied by the Court below.

A. THE SHARES OF STOCK ISSUED IN DICK VOIGHT BUICK, INC. ARE SECURITIES WITHIN THE MEANING OF THE 1933 AND 1934 ACTS.

Defendants below, relying solely on selected passages of United Housing Foundation v. Forman, 421 U.S. 837 (1975), claimed that the shares of stock in DICK VOIGHT BUICK, INC. were not securities within the meaning of the 1933 and 1934 Acts, because Plaintiff, RICHARD VOIGHT, purchased the shares of stock not solely for investment purposes, but, rather as a means to obtain a GENERAL MOTORS franchise. However, the shares of stock in DICK VOIGHT BUICK, INC. possessed all the characteristics "traditionally associated with stock" (United Housing, supra, at 632), and hence were securities within the meaning of the 1933 and 1934 Acts.

Defendants correctly paraphrased the Supreme Court in United Housing, stating that merely because a "stock" is defined as a security in §2(1) of the 1933 Act and §3(10) of the 1934 Act it does not follow that all shares of stock are ipso facto "securities" and subject to regulation under the Federal Securities Laws. However, Defendants failed to correctly distinguish United Housing from the instant situation.

The United Housing Court stated that "the most common feature of stock (is) the right to receive 'dividends contingent upon an apportionment of profits'." (United Housing Foundation, Inc. v. Forman, supra, at 631, quoting Tcherepnin v. Knight, 389

U.S. 332, 339 [1967])). The United Housing Court further stated that other traditional characteristics of stock include: negotiability, the ability to be pledged or hypothecated, the ability to appreciate in value, and the fact that shareholders held voting rights in proportion to the shares held. (United Housing, supra, at 632). The Court held that shares in a cooperative government housing project were not securities because they possessed none of these characteristics, but rather:

"The inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit."
United Housing at 632.

United Housing is easily distinguishable from the instant situation. The shares of stock in DICK VOIGHT BUICK, INC. possessed all of the features traditionally possessed by shares of stock:

- 1) Plaintiff, RICHARD VOIGHT, as shareholder, had the right to receive dividends from the shares upon an apportionment of profit;
- 2) the shares could appreciate in value;
- 3) Plaintiff, RICHARD VOIGHT, held voting rights in DICK VOIGHT BUICK, INC. in proportion to the shares he held;
- 4) the shares could be pledged or hypothecated and
- 5) the shares were negotiable.

Contrary to Defendants' assertion that Plaintiff, RICHARD VOIGHT, purchased the shares in DICK VOIGHT BUICK, INC. solely to obtain the GENERAL MOTORS franchise, Plaintiffs' Complaint repeatedly alleges that Plaintiff, RICHARD VOIGHT, and his wife invested in the franchise for investment purposes, among other reasons. (e.g. Complaint, ¶116;

Appendix, p. 41). One invests in a business in the hope of realizing a profit; one does not live in low-income housing for that reason. The distinction between the instant situation and the United Housing situation is apparent. The economic reality of the instant situation was investment for profit; the economic reality of United Housing was acquisition of a residence.

The shares of stock in DICK VOIGHT BUICK, INC. are securities within the meaning of the 1933 and 1934 Acts. Their nature is different than the shares involved in United Housing, supra. At the least, there are questions of fact which exist as to the nature of this stock which makes a final determination impossible at this stage of the proceeding. The District Court erred in ruling as a matter of law that the stock in DICK VOIGHT BUICK, INC. could not be a security.

B. THERE EXISTS AT LEAST A QUESTION
OF FACT WHETHER THE GENERAL MOTORS
FRANCHISE AGREEMENT CONSTITUTES A
SECURITY WITHIN THE MEANING OF THE
1933 and 1934 ACTS.

Defendants also contend that the franchise agreement does not constitute a security within the meaning of the Federal Securities Acts. However, whether the franchise agreement constitutes a security is clearly a question of fact dependent upon whether the facts indicate that the agreement is an "investment contract". The original statement of what constitutes an investment contract was set forth by the Supreme Court:

"The test for an investment contract is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."
Tcherepnin v. Knight, 389 U.S. 332, 338 (1967), quoting SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

The "Howey" test was later interpreted by the Securities Exchange Comm. in Release No. 5211, issued on November 30, 1971 (SEC Securities Act Release No. 5211, Securities Exchange Act Release No. 9387 (November 30, 1971), reprinted in [1971-1972] Transfer Binder CCH Fed. Sec. L. Rep. ¶78, 446) (hereinafter Release). While the Commission concentrated its analysis in the Release primarily on pyramid sales plans, it stated that the analysis did not exclude application to other similar forms of promotion. The Securities Exchange Commission took the position that the

language in Howey, "efforts of others", was meant to require an examination of "those types of essential managerial efforts but for which the anticipated return could not be produced."

(Release, supra.) From the Release it was apparant that the appropriate analysis of a franchise as an "investment contract" involves an examination of those essential managerial efforts which would produce the anticipated return.

The policy enunciated by the Securities Exchange Commission in Release No. 5211 was tested judicially in SEC v. Glenn W. Turner Enterprise, Inc., 474 F.2d 476 (9th Cir. 1973). The following test resulted:

"[W]hether the efforts made by those other than the investor are the undeniably significant one, those essential managerial efforts which affect the failure or success of the enterprise"
474 F.2d at 482.

Turner was further interpreted by the Southern District of New York in Wieboldt v. Metz, 355 F. Supp. 255 (S.D. N.Y. 1973), where the court limited the application of Turner to those franchise agreements in which the franchisee has "no meaningful control over his own enterprise..." (355 F. Supp. at 260) However, the District Court found that within the franchisee's exclusive territory, he had "virtually unfettered control." (355 F. Supp. at 261) and

the franchise agreement made no mention of termination of the franchise should the franchise "fail to operate (his franchise) in accordance with (the franchisor's) standardized systems and operational methods" (355 F. Supp. at 261).

Of persuasive value is Venture Investment Company, Inc. v. Schaefer, 3 Blue Sky L. Rep. ¶71,031 (D. Colo. 1972). In that case, Plaintiff obtained through investment an exclusive area franchise to market correspondence courses produced by Continental Schools of America. Based upon misrepresentations made by the Continental promoter, the Plaintiff sued for damages alleging violations of the Federal and state securities laws as well as common-law fraud. The Court found the existence of a security, relying in part on the facts that Continental could refuse to provide course materials to Plaintiff's customers, Continental could change the materials sold, and Continental could decide to go out of business, leaving the Plaintiff without a product to sell.

It is at the very least a question of fact whether the GENERAL MOTORS franchise agreement is an "investment contract" within the meaning of the Howey and Turner tests and therefore a "security." It is clear that in his association with GENERAL MOTORS, Plaintiff RICHARD VOIGHT was restrained from exercising essential managerial efforts with regard to DICK VOIGHT BUICK, INC. As in Wieboldt and Venture, Defendants GENERAL MOTORS

controlled those managerial decisions essential to producing profit from the Plaintiff's business investment. The GENERAL MOTORS Defendants and the MARINE MIDLAND Defendants determined the capital structure of the corporation, the business hours, the working schedule, the number of employees and their qualifications, what automobiles Plaintiff RICHARD VOIGHT could sell and for what price. While the Plaintiff might show considerable initiative within his own sphere, his initiative and managerial efforts were at the will of the Defendants. It was within their power and whim to ruin his business. They had access to all his records, and he was entirely dependent on them for his supply of goods and sources of finance. They were capable of thwarting all of his expertise and managerial efforts. It is the relation of power between franchisor and franchisee which must be scrutinized and Plaintiff's power was miniscule when matched against that of the Defendants.

Finally, it is clear that the fraud provisions of the Federal Securities laws are broad, protecting the investor from a wide range of fraudulent acts and practices in connection with the sale of a security. (See A.T. Brodt Co. v. Perlow, 375 F.2d 393 (2d cir. 1967), Karvellas v. Sellas, 376 F. Supp. 1010 (D.C. Ill. 1974)). Whether the franchise agreement is a security, is a question of fact, not susceptible of determination upon this motion. Plaintiff, RICHARD VOIGHT has stated valid claims in

COUNT XVI of the Complaint, and is entitled to the protection of the Federal Securities Laws. For these reasons, Defendants' motion in this respect must be denied.

ARGUMENT

POINT III

PLAINTIFFS HAVE STATED A CLAIM
AGAINST THE MARINE MIDLAND DEFEN-
DANTS FOR CONSPIRACY TO VIOLATE
SECTIONS 3 AND 7 OF THE CLAYTON
ANTITRUST ACT.

COUNT X of Plaintiffs' Complaint alleges that "Defendants further conspired to violate State and Federal Laws enumerated herein". (Complaint, ¶107; Appendix, p. 39). COUNTS XI and XII of Plaintiffs' Complaint allege violations of Section 3 (15 U.S.C. §14) and Section 7 (15 U.S.C. §18) of the Clayton Antitrust Act by all Defendants. (Complaint, ¶86, 89; Appendix, p. 35, 36).

The actual violations of the Clayton Act alleged by Plaintiffs were committed by the GENERAL MOTORS Defendants. However, the MARINE MIDLAND Defendants acted in concert with the GENERAL MOTORS Defendants and thus, conspired to violate Sections 3 and 7 of the Clayton Antitrust Act.

Dealing first with the Section 3 violation, the GENERAL MOTORS Defendants forced unwanted and unordered automobiles and parts upon Plaintiffs by illegal "tying" arrangements which violated Section 3 of the Clayton Act. (Complaint, ¶54A; Appendix, p. 26). The MARINE MIDLAND Defendants manipulated Plaintiffs' floor plan to facilitate this illegal conduct by the GENERAL MOTORS Defendants. For example, when Plaintiffs had reached their credit limit, the MARINE MIDLAND Defendants would increase that limit at the behest

of the GENERAL MOTORS Defendants, and thus facilitate the forcing of unwanted cars upon Plaintiffs. This conduct shows a conspiracy by the MARINE MIDLAND Defendants and the GENERAL MOTORS Defendants to violate Section 3 of the Clayton Act. In other words, Plaintiffs' Complaint states a claim against the MARINE MIDLAND Defendants for conspiracy to violate Section 3 of the Clayton Act, their co-conspirators being the GENERAL MOTORS Defendants who actually violated that statute.

Plaintiffs' position in regard to the MARINE MIDLAND Defendants' violations of Section 7 of the Clayton Act, is essentially similar to Plaintiffs' position in regard to said Defendants' violations of Section 3 of the Clayton Act. Plaintiffs have alleged that the GENERAL MOTORS Defendants violated Section 7 of the Clayton Act by acquiring the stock and assets of DICK VOIGHT BUICK, INC., with the effect of substantially lessening competition and tending to create a monopoly. Plaintiffs do not intend that the MARINE MIDLAND Defendants acquired the assets of Plaintiff, DICK VOIGHT BUICK, INC., but rather that the joint conduct of the GENERAL MOTORS Defendants and the MARINE MIDLAND Defendants put Plaintiffs in an impossible financial position and permitted the GENERAL MOTORS Defendants to acquire Plaintiffs' assets.

Once again, it is Plaintiffs' contention that the MARINE MIDLAND Defendants conspired and combined with the GENERAL MOTORS Defendants and that this conduct allowed the GENERAL MOTORS Defendants to violate Section 7 of the Clayton Act. It is

reasonable to infer that the MARINE MIDLAND Defendants intended to place Plaintiffs in such an untenable position that the GENERAL MOTORS Defendants could acquire their assets in violation of Section 7 of the Clayton Act. While only the GENERAL MOTORS Defendants may have actually violated this statute, the MARINE MIDLAND Defendants are liable for their conspiracy with the GENERAL MOTORS Defendants which paved the way for this violation.

Apparently the Court below based its decision regarding alleged violations of Section 3 and Section 7 of the Clayton Antitrust Act on the fact that the MARINE MIDLAND Defendants did not actually violate these statutes. While this may be correct, Plaintiffs' allegations of a conspiracy between the GENERAL MOTORS Defendants and the MARINE MIDLAND Defendants to violate Section 3 and Section 7 of the Clayton Antitrust Act state a Federal claim against the MARINE MIDLAND Defendants.

ARGUMENT

POINT IV

PLAINTIFFS' COMPLAINT ALLEGES CONSPIRACY
BY THE MARINE MIDLAND DEFENDANTS TO
VIOLATE FEDERAL STATUTES AND THESE
CLAIMS ARE SUFFICIENT AS A MATTER OF
LAW.

In addition to the violations of Federal Statutes already discussed, Plaintiffs in COUNT XV of the Complaint have alleged that all Defendants, including the MARINE MIDLAND Defendants, conspired to violate the Federal Laws enumerated in the Complaint. (Appendix, p. 39, 40). The violations and attempted violations of the antitrust laws and Federal Securities laws by the MARINE MIDLAND Defendants have already been discussed. However, Plaintiffs also contend that the MARINE MIDLAND Defendants conspired with the GENERAL MOTORS Defendants to violate an additional Federal Statute and that this conspiracy provides an additional basis for retaining jurisdiction over the MARINE MIDLAND Defendants.

COUNT IX of Plaintiffs' Complaint (Appendix, p. 32, 33) alleges that the GENERAL MOTORS Defendants violated the provisions of the Federal Automobile Dealer Day in Court Act, 15 U.S.C. §1221, et seq. Plaintiffs have alleged that the GENERAL MOTORS Defendants acted coercively toward Plaintiffs, both in the performance of the Franchise Agreement and in forcing Plaintiffs' termination as an automobile dealer. GENERAL MOTORS is obviously an automobile manufacturer within the statutory definition. (Complaint, ¶6; Appendix, p. 3).

Due to the cooperation of and concerted activity with the MARINE MIDLAND Defendants, GENERAL MOTORS participated in a conspiracy to violate this Statute along with the MARINE MIDLAND Defendants and the other Defendants named herein. While the MARINE MIDLAND Defendants concededly are not automobile manufacturers within the statutory definition, and thus, could not actually violate the Automobile Dealer Day in Court Act, they nevertheless conspired with GENERAL MOTORS to facilitate GENERAL MOTORS' violations of this statute. Therefore, there is Federal jurisdiction over this conspiracy which is alleged in COUNT XV of Plaintiffs' Complaint against the MARINE MIDLAND Defendants.

In addition to this conspiracy in which the MARINE MIDLAND Defendants were involved, Plaintiffs have already discussed the conspiracies by the MARINE MIDLAND Defendants to violate Sections 1 and 2 of the Sherman Antitrust Act, Sections 3 and 7 of the Clayton Antitrust Act and the Federal Securities Law. The MARINE MIDLAND Defendants' involvement in these conspiracies provides a basis of Federal jurisdiction, as do the actual violations of the various Federal statutes committed by the MARINE MIDLAND Defendants.

ARGUMENT

POINT V

THE COURT BELOW ERRED IN DISMISSING
PLAINTIFFS' COMPLAINT WITHOUT GRANTING
PLAINTIFFS LEAVE TO AMEND THE COMPLAINT.

The District Court dismissed Plaintiffs' Complaint with prejudice as to the MARINE MIDLAND Defendants (Appendix, p. 101). Its decision merely stated that no claim was stated against the MARINE MIDLAND Defendants under either the Sherman or Clayton Antitrust Acts or the Federal Securities Laws (Appendix, p. 95). The Court also ruled that portions of Plaintiffs' claims under COUNT XVI for violations of the Federal Securities Laws were barred by the Statute of Limitations (Appendix, p. 95). Finally, the Court held that COUNT XV alleging conspiracy to violate Federal laws, did not state any independent Federal claim (Appendix, p. 96). Except for the District Court's statement regarding the Statute of Limitations' bar to certain Federal Securities violations, and a statement that the stock and franchise agreement were not securities, the Court below did not give any reasons for its ruling that Plaintiffs failed to state a claim.

Plaintiffs contend that the Court below was in error in dismissing the Complaint with prejudice. Even if the Complaint failed to state Federal claims against the MARINE MIDLAND Defendants, Plaintiffs should have been given an opportunity to correct

the alleged deficiencies in the Complaint. The MARINE MIDLAND Defendants' motion to dismiss was directed toward the original Complaint filed by Plaintiffs and Plaintiffs have never had an opportunity to move for leave to amend the Complaint because the District Court dismissed the Complaint with prejudice.

If the Court below believed that Plaintiffs' pleading was not sufficiently detailed, it should have dismissed the Complaint without prejudice so that Plaintiffs could have made application to serve an Amended Complaint or conditionally dismissed the Complaint unless Plaintiffs filed a more definite statement as to the facts and circumstances substantiating their claims.

By dismissing the Complaint with prejudice, the District Court forced Plaintiffs to resort to the appellate process for relief. At the very least, the District Court should have given Plaintiffs an opportunity to correct the deficiencies which it apparently found in Plaintiffs' Complaint. Instead, it summarily dismissed the entire Complaint with prejudice, on the MARINE MIDLAND Defendants' initial motion addressed to the sufficiency of that pleading. Plaintiffs contend that this was an abuse of discretion by the District Court and that especially in light of Conley v. Gibson, supra; Poller v. Columbia Broadcasting Systems, Inc., supra; and Nagler v. Admiral Corporation, supra, its ruling was erroneous.

Had the District Court merely ruled that Plaintiffs' Complaint failed to state a claim, Plaintiffs could have moved for leave to serve an Amended Complaint pursuant to Federal Rules of Civil Procedure Rule 15(a). The District Court prevented Plaintiffs from so moving and thus forced Plaintiffs to appeal. The District Court erred in dismissing Plaintiffs' Complaint with prejudice because this precluded Plaintiffs from correcting whatever deficiencies the District Court found in the Complaint.

CONCLUSION

For the reasons above stated, Plaintiffs-Appellants request the following relief from This Court:

1) That This Court reverse the District Court's Dismissal of Plaintiffs' Complaint with prejudice and rule that Plaintiffs' Complaint has properly stated Federal claims against the MARINE MIDLAND Defendants.

2) In the alternative, that This Court remand this action to the District Court with instructions that Plaintiffs be given leave to serve an Amended Complaint or at least the opportunity to move for leave to serve an Amended Complaint.

3) Such other and further relief as to the Court may seem just and proper, including costs of this Appeal pursuant to Rule 39 of the Federal Rules of Appellate Procedure.

Respectfully submitted,

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Rochester, New York 14614

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 RICHARD VOIGHT and
4 DICK VOIGHT BUICK, INC.,

5 Plaintiffs-Appellants,

6 vs.

DOCKET NO. 77-7024

7 GENERAL MOTORS CORPORATION,
8 MOTORS HOLDING DIVISION,
9 GENERAL MOTORS CORPORATION;
10 BUICK MOTOR DIVISION,
11 GENERAL MOTORS CORPORATION;
12 GENERAL MOTORS ACCEPTANCE CORPORATION;
13 ARGONAUT DIVISION, GENERAL MOTORS CORPORATION;
14 MARINE MIDLAND BANK, EDWARD HIGGINS,
15 HARRY FORNOROLA, WILLIAM MONRIAN,

16 Defendants,

17 and

18 MARINE MIDLAND BANK, HARRY FORNOROLA and
19 WILLIAM MONRIAN,

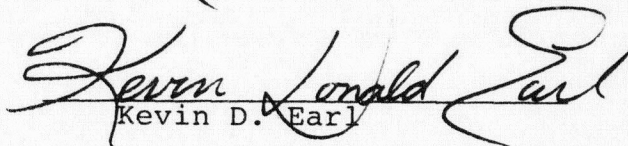
20 Defendants-Appellees.

21 STATE OF NEW YORK)
22 COUNTY OF MONROE) SS:
23 CITY OF ROCHESTER)

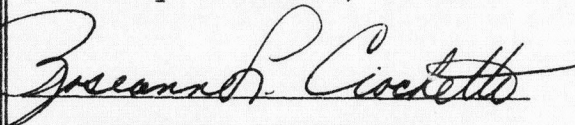
24 KEVIN D. EARL, being duly sworn, deposes and says:
25 That deponent is not a party to this action, is over eighteen years
26 of age and resides at Rochester, New York.

27 That on the 18th day of March, 1977, deponent
28 served the within two (2) copies of Plaintiffs-Appellants' Brief and
two (2) copies of Plaintiffs-Appellants' Appendix on each of the
following attorneys: HARTER, SECREST & EMERY, 700 Midtown Tower,
Rochester, New York 14614 and PHILLIPS, LYTLE, HITCHCOCK, BLAINE &
HUBER, 3400 Marine Midland Center, Buffalo, New York 14203, the
addresses designated by said attorneys for that purpose, by

1 depositing the same enclosed in a postpaid properly addressed
2 wrapper, in an official depository under the exclusive care and
3 custody of the United States Postal Service within the State of
4 New York.


Kevin D. Earl

5
6
7 Sworn to before me this
8 24th day of March, 1977.

9 

10 ROSEANN L. CICHETTI

11 Notary Public, State of N.Y., Monroe County

12 My Commission Expires March 30, 1978